CHAPTER 11

ENVIRONMENTAL LAW IN OPERATIONS

References:

1. Field Manual 3-100.4, Environmental Considerations in Military Operations (1 June 2000).
2. Executive Order 12,114, 44 Fed. Reg 1957 (1979).
3. DoD Directive 6050.7, Environmental Effects Abroad of Major Department of Defense Actions (31 March 1979).
4. AR 200-2, Environmental Effects of Army Actions (23 Dec. 1988).
5. AFI 32-7006, Environmental Programs in Foreign Countries (29 Apr 1994).
6. OPNAVINST 5090.1B, Environmental and Natural Resources Manual (1 Nov 94, w/Change 2, 9 SEP 99).
7. OPNAVINST 3100.5E, Navy Operating Area and Utilization of Continental Shelf Program (17 Nov. 88).
8. MCO 5090.2A, Environmental Compliance and Protection Manual (10 Jul 98).
9. Joint Pub. 4-04, Joint Doctrine for Civil Engineering Support, II-7 (26 Sep. 1995).
10. DoD Instruction 4715.5, Management of Environmental Compliance at Overseas Installations (22 Apr. 1996).

According to the U.S. Army's Environmental Strategy for the 21st Century, "[T]he Army will be a leader in environmental stewardship." This sweeping statement of objective is not limited to garrison environments. As a result, the judge advocate must advise commanders and train soldiers regarding environmental law issues related to overseas and domestic military operations. First, judge advocates must recognize environmental law issues that other officers and officials may not have considered. Second, judge advocates must know how to analyze these issues and develop appropriate and credible solutions for such issues. Third, judge advocates must be prepared to advise and train supported commanders and units in environmental aspects of domestic and overseas operations along the entire operational spectrum.

Frankly, this is an area where the doctrine has actually gotten ahead of law and policy. In particular, documents like Field Manual (FM) 3-100.4 [jointly issued with the Marines as Marine Corps Reference Publication (MCRP) 4-11B] *Environmental Considerations in Military Operations,* 1 June 2000, are excellent tools to assist the operational law attorney. This publication, as well as virtually every other reference document you may need relating to environmental issues, can be found at www.denix.osd.mil, the Department of Defense's Environmental Network and Information Exchange. Attorneys should access this site as early as possible in order to obtain a password and fuller access to restricted databases.

Protecting the environment is today a major international, United States, and Department of Defense concern. The international community is increasingly vigilant in its oversight of the environmental consequences of military operations. Judge advocates must ensure that leaders are aware of both the rules and the importance of complying with these rules. Failure to take adequate account of environmental considerations can jeopardize current and future operations, generate domestic and international criticism, result in a loss of command money due to fines and penalties, produce costly litigation, and result in personal liability for both the leader and the individual soldier.

As a final introductory matter, planners must be aware of the significant role played by contractors in environmental matters. Whether a Logistics Civilian Augmentation Program (LOGCAP) contract or some other vehicle, much of the environmental work in an operation is likely to be done by contract. Get your contract and fiscal law people involved early. For a useful, short study of lessons learned in the various Bosnia operations see "*U.S. Army Environmental Protection Activities during Operations Joint Endeavor, Joint Guard, and Joint Forge"* by Zettersten and Dale, in the Winter 2000 edition of Federal Facilities Environmental Journal (available on DENIX).

ENVIRONMENTAL PLANNING REQUIREMENTS VS. ENVIRONMENTAL COMPLIANCE REQUIREMENTS

In thinking about the application of environmental law to U.S. military operations, it is useful to distinguish between two types of law. Some laws require that some type of environmental planning process be conducted in conjunction with military operations. Other legal requirements may impose substantive restrictions on our operations (e.g. our ability to discharge wastes into the air or water, or bury wastes in the ground, or transport them across international boundaries).

As a general rule, domestic environmental statutes have no extraterritorial application during overseas operations. For instance, the Endangered Species Act (ESA), 16 U.S.C. §§1531-1543 (1973)[1] and the National Environmental Policy Act (NEPA) 42 U.S.C. §§4321-4370 (1969)[2] are not generally considered to have extraterritorial application.[3] NEPA does, however, apply to major federal actions located outside of the U.S. that have significant environmental impacts inside the U.S. The location of the impact, and not the action, determines NEPA applicability.

Although the strict requirements of domestic statutes do not apply to most overseas operations, U.S. executive branch policy, discussed below, is often couched as a requirement to adhere to "U.S. environmental requirements, if feasible."[4] Because of this perceived general policy, during Operations Desert Shield/Storm many Judge Advocates became confused as to the need for an "emergency waiver." In fact, several of the Desert Storm Assessment Team Report (DSAT) assumptions are inaccurate because of confusion about the need to apply NEPA to our activity in Southwest Asia.[5] In reality, no such waiver was needed.

Environmental Planning Requirements: Executive Order No. (EO) 12,114.[6] Executive Order 12,114 creates "NEPA like" rules for overseas operations. EO 12,114, however, only applies to specific categories of major federal actions which have significant effects on the environment outside the U.S. This EO is implemented in DoD by DoD Directive 6050.7, *Environmental Effects Abroad of Major Department of Defense Actions*, 31 March 1979. This Directive is in turn implemented by various Regulations and Instructions of the Armed Services. For the Army, AR 200-2, *Environmental Effects of Army Actions* (23 Dec. 1988) implements it. It is implemented in the Air Force by AFI 32-7006, *Environmental Program in Foreign Countries*, Chapter 4 (29 Apr 1994). The Navy implements it by OPNAVINSTs 5090.1B and 3100.5E. The Marine Corps implements the directive by MCO 5090.2A. The following analysis walks you through the application of EO 12,114 to a military mission.

Pre-Operation Planning

[1] The U.S. Supreme Court reversed the one case where the ESA had been found to have extraterritorial application. The Court's rationale, however, was not based upon any of the substantive environmental issues involved, but on lack of standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992). Most scholars, however, believe the result would have been the same had the Court considered the extraterritoriality question.

[2] NEPA does not serve to prohibit actions; instead it creates an environmental impacts analysis requirement that ensures that Agency decision-makers consider the environmental impact of federal actions. The required documents are usually referred to as either environmental assessments (EA) or environmental impact statements (EIS). The production of these analyses can cause substantial delays in a planned federal action.

[3] For a statute to have extraterritorial application there must be language within the statute that makes "a clear expression of Congress' intent for extraterritorial application." With one exception, courts have consistently refused to apply NEPA outside of the U.S. In that one case, Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993), the court held that NEPA applies to the National Science Foundation's decision to burn food wastes in Antarctica. This finding (the exception and not the rule) was based upon the absence of a sovereign within Antarctica and because the agency decision-making occurred within the U.S.. More recently, in NEPA Coalition of Japan v. Defense Department, 837 F. Supp. 466 (D.D.C. 1993), the court refused to make an extraterritorial application of NEPA. The court cited (1) the strong presumption against extraterritorial application, (2) possible adverse affect upon existing treaties, and (3) the adverse affect upon U.S. foreign policy.

[4] U.S. ARMY LEGAL SERVICES AGENCY, THE DESERT STORM ASSESSMENT TEAM'S REPORT TO THE JUDGE ADVOCATE GENERAL OF THE ARMY, Environmental Law 3 & Issue 143 (22 Apr. 1992) [hereinafter DSAT]. Some Judge Advocates during OPERATION DESERT STORM received confusing guidance to apply U.S.-like environmental protections to their activities, when feasible. This guidance was not based upon the requirements of either NEPA or Executive Order No. 12,114. Every SINGLE U.S. activity within Southwest Asia (taken pursuant to Operations Desert Shield/Storm) was exempted under Executive Order No. 12,114 (*see* discussion later in this chapter for an explanation of exempted status under EO 12,114).

[5] *See id*. at Environmental Law 1-3.

[6] Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979) *reprinted at* 42 U.S.C. § 4321, at 515 (1982) [hereinafter EO 12,114]. Portions of EO 12,114 are reprinted and discussed in Appendixes G and H, Army Regulation 200-2, *Environmental Effects of Army Actions* (23 Dec 88).

General Considerations. Judge advocates must recognize that Executive Order 12,114 always mandates *some degree* of environmental stewardship by United States forces in regard to its operations outside of the United States or its territories. Judge advocates should add this short document to their operational law library and refer to it during the operational planning phase. In addition to the Order, military lawyers should turn to the more specific documents that implement the Order: Department of Defense Directive 6050.7 (DoD Directive 6050.7),[7] and Army Regulation 200-2 (AR 200-2).

When executing a mission within a foreign nation, the military leader should first consider three general rules that dictate the interpretation and compliance with all other rules. First, the United States, based upon operational realities and necessities, should take all reasonable steps to act as a good environmental steward. Second, the United States should respect treaty obligations and the sovereignty of other nations. This means, at a minimum, "exercising restraint in applying U.S. laws within foreign nations unless Congress has expressly provided otherwise."[8] Third, any acts contemplated by officials within the Department of Defense that require "formal communications with foreign governments concerning environmental agreements and other formal arrangements with foreign governments" must be coordinated with the Department of State.[9]

The Required Analysis and Actions. Instead of promulgating additional and possibly more onerous requirements, the Army's regulation simply restates the requirements of DoD Directive 6050.7.[10] Very similar to Executive Order 12,114, DoD Directive 6050.7 is organized around four types of environmental events described within the Order:

1. Major federal actions that do significant harm to the "global commons;"

2. Major federal actions that significantly harm the environment of a foreign nation that is not involved in the action;

3. Major federal actions that are determined to be significant[ly] harm[ful] to the environment of a foreign nation because they provide to that nation: (1) a product, or involve a physical project that produces a principal product, emission, or effluent, that is prohibited or strictly regulated by Federal law in the United States because of its toxic effects [to] the environment create a serious public health risk; or (2) a physical project that is prohibited or strictly regulated in the United States by Federal law to protect the environment against radioactive substances;

4. Major federal actions outside the United States that significantly harm natural or ecological resources of global importance designated by the President or, in the case of such a resource protected by international agreement binding on the United States, designated for protection by the Secretary of State.[11]

The judge advocate must consider whether the proposed operation might generate any one of the four environmental events listed above. If the answer is yes, then the military leader should either seek an exemption or direct the production of either a "bilateral or multilateral environmental study (ES), or a concise environmental review (ER) of the specific issues involved" (which would include an environmental assessment, summary environmental analysis, or other appropriate documents).

The Participating Nation Exception. As the judge advocate proceeds through the regulatory flowchart of required analysis and actions, the most important and frequently encountered problem is the "participating nation" determination.[12] This is because most overseas contingency operations do not generate the first, third, or fourth types of environmental

[7] Dep't of Defense, Dir. 6050.7, Environmental Effects Abroad of Major DoD Actions (31 March 1979) [hereinafter DoD Dir. 6050.7].

[8] *Id*. at para. 8-3 (b). This general rule has a substantial impact on the interpretation of domestic law requirements. For instance, the scope and format of any environmental review conducted within a foreign nation is controlled not just by United States law and regulation, but by relevant international agreements and arrangements. *See id*. para 8-5 (a).

[9] *Id*. at para. 8-3 (c). The judge advocates that work the environmental law issues should open a line of communication with a point of contact (POC) in the Department of State early on in the process.

[10] *Id*. at App. H.

[11] *Id*. at App. H, para. B.

[12] *Id*. at App H, para. B.1.a.

events listed above. Accordingly, a premium is placed upon the interpretation of the second type of environmental event (major federal actions that significantly harm the environment of a foreign nation that is not involved in the action).

The threshold issue appears to be whether or not the host nation is participating in the operation. If the nation is participating, then no study or review is technically required.[13] Of the four recent contingency operations (Somalia; Haiti; Guantanamo Bay, Cuba; and Bosnia), the United States relied upon the so called "participating nation exception" in Haiti and Bosnia. In Somalia and Guantanamo Bay, because neither Somalia nor Cuba participated with the United States forces in either Operation Restore Hope or Operation Sea Signal, the United States could not utilize the participating nation exception. Accordingly, the United States had a choice of accepting the formal obligation to conduct either an ES or an ER, or seeking an exemption. In both cases, the United States sought and received an exemption.[14]

How does the military lawyer and operational planner distinguish between participating and non-participating nations? The applicable Army regulation states that the foreign nation involvement may be signaled by either direct or indirect involvement with the United States, and even by involvement through a third nation or international organization.[15]

The foregoing regulatory guidance is helpful, but the nuanced and uncertain nature of peace operations requires additional discussion on this point. One technique for discerning participating nation status is to consider the nature of the entrance into the host nation. There are generally three ways that military forces enter a foreign nation: 1) a forced entry, 2) a semi-permissive entry, or a 3) permissive entry. United States forces that execute a permissive entry are typically dealing with a participating (cooperating) nation. Conversely, United States forces that execute a forced entry would rarely deal with a participating nation. The analysis required for these two types of entries is fairly straightforward.

The semi-permissive entry presents a much more complex question. In this case, the judge advocate must look to the actual conduct of the host nation. If the host nation has signed a stationing or status of forces agreement, or has in a less formal way agreed to the terms of the United States deployment within the host nation's borders, the host nation is probably participating with the United States (at a minimum in an indirect manner). If the host nation expressly agrees to the United States' entry and to cooperate with the military forces of United States, the case for concluding the nation is participating is even stronger.[16] Finally, if the host nation agrees to work with the United States on conducting a bilateral environmental review, the case is stronger still.[17]

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[13] Nevertheless, a study or review of some nature has been promulgated in every recent operation.

[14] *See* Memorandum, Lieutenant General Walter Kross, Director, Joint Staff, to The Under Secretary of Defense for Acquisition and Technology, subject: Exemption from Environmental Review (17 Oct. 1994) [hereinafter Kross Memorandum] (In regard to Operation Sea Signal, General Kross forwarded the CINCUSACOM request for exemption. The request was based on a disciplined review of Sea Signal's probable environmental impact, a short rendition of the facts, and a brief legal analysis and conclusion*). See also* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, AFTER ACTION REPORT, UNITED STATES ARMY LEGAL LESSONS LEARNED, OPERATION RESTORE HOPE, 5 DECEMBER 1992 - 5 MAY 1993, 23 (30 March 1995) [hereinafter RESTORE HOPE AAR]. It is important to note that in both operations, even though United States forces received an exemption from the review and documentation requirement, the United States still prepared an environmental audit and United States forces applied well established environmental protection standards to events likely to degrade the host nation's environment.

Lieutenant Colonel Richard (Dick) B. Jackson, having served as a legal advisor with the United States Atlantic Command Staff Judge Advocate's Office during both Operations Uphold Democracy and Sea Signal notes that Cuba never did anything, by act or omission that could be construed as cooperating or participating in Operation Sea Signal. On the other hand, the entrance of United States forces into Haiti was based upon an invitation that was reduced to writing and signed by the Haitian head of state, President Emile Jonassaint, on September 18, 1994. In fact, this agreement, signed by former President Jimmy Carter and President Jonassaint and referred to as the Carter-Jonassaint Agreement, expressly stated that Haitian authorities would "work in close cooperation with the U.S. Military Mission." Interview, Lieutenant Colonel Richard B. Jackson, Chair, International and Operational Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia (Mar. 20, 1997). *See also* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994 - 1995 – LESSONS LEARNED FOR JUDGE ADVOCATES App. C (1995) [hereinafter the CLAMO HAITI REPORT].

[15] *See* AR 200-2, *supra* note 176, at App. H, para. A.1.a.

[16] *See* Memorandum, Major Mike A. Moore, United States Atlantic Command, J4 - Engineer to Lieutenant Colonel Richard (Dick) B. Jackson, subject: Environmental Concerns of MNF (24 Jan. 1995) [hereinafter Moore Memorandum] (explaining the EO 12,114 did not apply to Operation Uphold Democracy because Haiti was a participating nation, and going on to explain that United States forces should coordinate with Haitian authorities to conduct a bilateral environmental audit).

[17] *Id*. at para. 4.

There is no requirement for a status of forces or other international agreement between the host nation and United States forces in order to document participating nation status. Participation and cooperation, however evidenced, is the only element required under Executive Order 12,114 and its implementing directive. As lawyers, however, we look to the most logical and obvious places for evidence of such participation. In recent operations, the United States and its host nation partners have documented the requisite participation within such agreements.

The decision to assume participating nation status is made at the unified command level, by the combatant commander.[18] In addition, once this election is made, the second decision of what type of environmental audit[19] to perform is also made at the unified command level.[20] In the cases of Operations Uphold Democracy and Joint Endeavor, the complete action was prepared by the tandem effort of the respective J4-Engineer Section and the Staff Judge Advocate's Office.[21] It was also these members of the staff that disseminated the environmental guidelines and standards adopted in the operations plans.

Operation Joint Endeavor is the most recent example of a participating nation. Under the terms of the Dayton Peace Accords,[22] the parties agreed to "welcome and endorse" the arrangements and agreements to implement the Accord's military aspects, to include the mission of the Implementation Force (IFOR) led by United Sates forces.[23] The detailed nature of the Accord, particularly article VI, removes any doubt that all parties agreed to participate in an endeavor to bring peace to the nations of the Former Yugoslavia. The obligation to work together, coordinate decisions, and provide logistical support is abundantly clear.

The operational planners for Operation Joint Endeavor and their legal advisors integrated this analysis into their planning.[24] They found that each of the nations that the operation might impact was participating. They forwarded their conclusions to General George A. Joulwan, then Commander-in-Chief, European Command, who approved the participating nation status by approving the environmental appendix to the operation plan.[25] As described earlier, General Joulwan's action took advantage of the participating nation exception.

The Exemptions. If the facts in a particular operation, are similar to those in either Operations Joint Endeavor or Uphold Democracy, then judge advocates would, under most circumstances, find that the host nation is a participating nation, and no further action would be required under regulations that implement Executive Order 12,114. If an exemption applies,

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[18] *See* DoD Dir. 6050.7, *supra* note 177.

[19] *See* Moore Memorandum, *supra* note 186. The word "audit' was adopted in lieu of the words "review" or "study" to make clear that the environmental assessment was driven by policy and not the formal documented review or study requirement of EO 12,114 or DoD Dir. 6050.7.

[20] Telephone interview Lieutenant Colonel Mike A. Moore (the same officer referred to as Major Mike A. Moore in earlier notes), United States Atlantic Command, J4 - Engineer (27 Mar. 1997) [hereinafter Moore Interview] (Lieutenant Colonel Moore served as the action officer tasked with determining what legal responsibilities the Command owed the environment during Operations Sea Signal and Uphold Democracy. He was also tasked with ensuring that an environmental audit was performed for Operation Uphold Democracy. Based upon his almost daily coordination with judge advocates with the Command's legal office, he and the Command's Staff Judge Advocate recommended that the Commander-in-Chief adopt the participating nation status and conduct a thorough environmental audit. Lieutenant Colonel Moore noted that the authority to make the decision rested at the unified command level. He also stated that several of the exemptions within EO 12,114 were pre-delegated down to United States Atlantic Command).

[21] *Id*.

[22] General Framework Agreement for Peace in Bosnia and Herzegovina [hereinafter the Dayton Accords]. The text of the Dayton Accords was initialed in Dayton, Ohio on November 21, 1995, and signed in Paris, France, on December 14, 1995. The United nations Security council, in acknowledgment of the Accords , issued Resolution 1031 (attaching , authorizing a multi-national implementation force (IFOR) "to take all necessary measures to effect the implementation" of Annex 1-A of the Accords. *See* S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., UN Doc. S/RES/1031 (1995) [hereinafter Resolution 1031].

[23] *Id*. at art. II.

[24] *See* Tab B to Appendix 5 to Annex D to United States Atlantic Command, Commander in Chief, Operations Plan 4243 (Operation Joint Endeavor): Environmental Considerations and Services (Unclassified) (2 December 1995) [hereinafter Joint Endeavor Operation Plan] The planners wrote that one of several major assumptions was that "[a]ll foreign nations potentially impacted by [the] operation are active participants or [are] otherwise involved in the operation." The import of this assumption is that it grants the "participating nation" exception to Executive Order 12,114's formal environmental review or study requirement. The plan went on to document that the limited amount of time available to prepare for the execution of the operation warrants the use of the exception. Very important to this analysis and not mentioned within the plan is the fact that the decision to take advantage of the participating nation exception can be made at the Unified Command level. Accordingly, the Commander and Chief, United States European Command does not have to forward this decision to a higher level of authority.

[25] *Id*.

and is granted by the proper authority, then the Executive Order requires no further action (meaning no formal documented review or study is required under DoD Directive 6050.7).[26]

Operations Restore Hope and Sea Signal provide recent examples of exempted operations. In Operation Sea Signal, for example, military lawyers quickly determined that Cuba could not be considered as a participating nation. Consequently, they considered the array of exemptions provided in DoD Directive 6050.7 and forwarded an exemption request based upon the exemption of national security.[27]

The exemptions are broad and would likely provide exempted status to most foreseeable overseas military operations. Consequently, these operations would enjoy exemption from the "NEPA-like" documented review requirements of Executive Order 12,114.

Unlike the participating nation exception, however, exempted status requires that the military leader take an affirmative step to gain a variance from the formal documentation requirements.[28] In the case of Operation Sea Signal, the Commander in Chief, United States Atlantic Command (CINCUSACOM) forwarded a written request for exempted status for the construction and operation of temporary camps at Naval Station Guantanamo Bay, Cuba. The request was forwarded through appropriate legal channels and the Joint Staff (through the Chairman's Legal Advisor's Office) to Mr. Paul G. Kaminski, The Under Secretary of Defense (Acquisition and Technology), for approval. Mr. Kaminski approved the request, citing the importance of Operation Sea Signal to national Security.[29]

The entire written action was only three pages long, including the one page memorandum action--three short paragraphs signed by Mr. Kaminski.[30] The action is shorter than most actions that involve the environment, because it may be drafted and forwarded with little prior review of environmental impact. In fact, the military lawyers involved in the process (the probable drafters of the action) need only know that the proposed operation is:

(1) A Major Federal Action;

(2) Which will likely Cause Significant Harm to the Host Nation's Environment;

(3) Where the Host Nation Is Not Participating; and

(4) One of the Ten Exemptions Is Applicable.

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[26] DoD Dir. 6050.7, *supra* note 177.

[27] *See* Memorandum, Paul G. Kaminski, Under Secretary of Defense (Acquisition and Technology), to Director, Joint Staff, subject: Exemption from Environmental Review Requirements for Cuban Migrant Holding Camps at Guantanamo, Cuba (Operation Sea Signal Phase V) (5 Dec. 1994).

[28] Under the participating nation exception, the unified commander may simply approve the operation plan that integrates the exception into its environmental consideration appendix. *See* Joint Endeavor Operation Plan, *supra* note 194.

[29] The decision memorandum integrated into the final action informed the Under Secretary of Defense, For Acquisition and Technology (the approval authority) that the CINCUSACOM had determined that Cuba was not a participating nation and that a significant impact on the host nation environment was likely. The author of the memorandum, therefore, requested that the approval authority grant an exemption based upon the national security interests involved in the operation. *See* Kross Memorandum, *supra* note 184.

[30] The memorandum action provided the (1) "general rule," as required by Executive Order 12,114 and DoD Directive 6050.7, (2) the explanation of why the operation does not fall within either of the two exceptions (either an action that does not cause a significant environmental impact or involving a host nation that is a "participating" nation), and (3) the four courses of action. The courses of action were provided as follows:

(1) Determination the migrant camp operation has no significant impact;

(2) Seek application of the national security interest or security exemption;

(3) Seek application of the disaster and emergency relief operation exemption; or

(4) Prepare an "NEPA-like" environmental review.

The action then provided discussion regarding each of the four options. The action explained that the first option "is without merit" because the "migrant camp will clearly have an adverse impact on the environment." It found merit with each of the exemptions, but concluded that approval of an exemption alone might later subject the Department of Defense to criticism on the ground that it actively avoided its environmental stewardship responsibility. The last option was rejected as setting an inappropriate and unsound precedent of admitting legal responsibilities not actually required by the law. *See* Kross Memorandum, *supra* note 184.

Once the exemption is approved, then the exempted status should be integrated into the operation plan. If this event occurs after the original plan is approved, the exempted status should be added as an additional appendix to the plan to provide supplemental guidance to the environmental consideration section of the basic plan.

It is the policy of the United States to always conduct a good faith environmental audit to reduce potential adverse consequences to the host nation's environment.[31] The reason the United States seeks to avoid the formal review or study requirement is to enhance operational flexibility, and in turn, enhance the opportunity for operational success.[32]

The practical result of the United States policy is that United States forces require "adherence to United States domestic law standards for environmental actions where such procedures do not interfere with mission accomplishment."[33] Accordingly, from the planning phase to the execution phase, the environment is an important aspect of all United States operations.

Early involvement by judge advocates is "essential to ensure that all appropriate environmental reviews have been completed" either prior to the entry of United States forces, or as soon thereafter as is possible.[34] Additionally, lawyers at all levels of command must be cognizant of an operation's environmental dimension so that they can ensure that the doctrinally required consideration is integrated into operation plans and orders, training events, and civil-military operations.[35]

Executing the Operation Plan

The military lawyer's job is not complete once the operation plan is drafted and approved. He must be heavily involved in the execution phase. Leaders, having read the general guidance contained within the operation order, will seek the lawyer's assistance in the onerous task of translating this guidance into action.[36] The judge advocate must ensure that this translation takes a form that those charged with its execution can easily understand.[37] All four of the operations cited above serve as good examples of this type of lawyering.

Joint doctrine provides the framework for the foregoing translation and related legal work.[38] This framework contains seven elements for environmental planning and compliance. These elements are as follows:

(1) Policies and Responsibilities to Protect and Preserve the Environment During the Deployment;

(2) Certification of Local Water Sources by Medical Field Units;

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[31] *See* DEP'T OF DEFENSE, JOINT PUB. 4-04, JOINT DOCTRINE FOR CIVIL ENGINEERING SUPPORT, II-7, para. 4.a. (26 Sep. 1995) [hereinafter JOINT PUB. 4-04] ("[O]perations should be planned and conducted with appropriate consideration of their effect on the environment in accordance with applicable U.S. and HN agreements, environmental laws, policies, and regulations").

[32] It is not the intent of United States forces to circumvent their environmental stewardship responsibilities. Military leaders must work within the system of law to balance operational success with many concerns, to include their environmental stewardship obligations.

[33] During Operation Restore Hope, in Somalia, the multi-national force, under United States leadership, determined that the actions of United States forces in that operation were exempted from Executive Order 12,114's formal review or study requirement, but the force adhered to United States domestic law to the greatest extent possible (defined as the extent to which such adherence did not frustrate operational success). *See* RESTORE HOPE AAR, *supra* note 184, at 23.

[34] *Id*. at para. 4.b.

[35] *Id*. at para. 4.c.

[36] Interview, then Lieutenant Colonel George B. Thompson, Jr., Chief, International and Operational Law Division, Office of the Judge Advocate, Headquarters, United States Army, Europe and Seventh Army, in Willingen, Germany (4 February 1997) (Lieutenant Colonel Thompson points out that a number of judge advocates "have their hands full working the day to day environmental piece." He stated that one such judge advocate was then Major Sharon Riley, Officer in Charge of the 1st Infantry Division's Schweinfurt Branch Office. Major Riley spent a good portion of her time in Bosnia-Herzegovina, helping commanders determine acceptable environmental standards by balancing operational considerations and realities with the Department of Defense's general environmental standards).

[37] The translation will usually require more than a single articulation. For example, some degree of soldier training must occur to ensure that soldiers understand the basic rules. This articulation of the standards is typically very basic. A more sophisticated articulation is made for subordinate commanders and engineering personnel who execute the environmental compliance mission. *See id*.

[38] *See* JOINT PUB 4-04, *supra* note 201, at II-8.

(3) Solid and Liquid Waste Management;

(4) Hazardous Materials Management (Including Pesticides);

(5) Flora and Fauna Protection

(6) Archeological and Historical Preservation; and

(7) Base Field Spill Plan.[39]

Lawyers can use this framework when assisting military leaders in the construction of an environmental compliance standard. In each of the foregoing operations, a checklist similar to the seven element framework set out above was used to construct an environmental compliance model that took into account each element or item on the checklist. For example, during Operation Joint Endeavor, military lawyers working in conjunction with the civil engineering support elements and medical personnel established concise standards for the protection of host nation water sources and the management of waste.[40] This aspect of host nation environmental protection was executed and monitored by a team comprised of judge advocates, medical specialists, and representatives from the engineer community.[41]

Lawyers, using this same type of framework, can troubleshoot problems that arise in compliance. For example, during Operation Restore Hope, judge advocates working for the task force legal advisor conducted weekly coordination meetings with members of the task force staff using a checklist similar to the seven element list described above.

The same approach was subsequently used in Operations Sea Signal, Uphold Democracy, and Joint Endeavor. Using this approach, lawyers in Restore Hope discovered that the task force engineers planned to use waste oil to suppress the dust problem, typical of many areas in Somalia, that hampered early aspects of the mission. Working with the task force staff, task force lawyers advised the use of environmentally sound dust suppressants.[42]

In addition to the seven elements listed above, military lawyers must also integrate into the operation plan a directive for documentation of initial environmental conditions. This was done in Operation Joint Endeavor, and pursuant to this directive unit commanders took photographs and made notes in regard to the status of land that came under their unit's control.[43] As a result of this excellent planning and execution, United States forces were protected against dozens of fraudulent claims filed by local nationals.[44]

A particularly vexing problem for overseas operations is the transportation of hazardous waste across international boundaries. The Basel Convention of 1989, which the United States has signed, but not ratified, imposes strict rules on signatory countries with respect to the movement of hazardous waste across international boundaries. This presented problems for our operations in both Bosnia and Kosovo—particularly with respect to Germany and Macedonia. The lead

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[39] Joint Publication 4-04 provides a description and examples of several of these seven elements. *See id.*

[40] Although identified in the planning process, management and disposal of waste involved a significant expenditure of task force manpower and fiscal assets. Early identification of environmental issues and continued monitoring in conjunction with others members of the staff is critical. *See* HEADQUARTERS, UNITED STATES, EUROPEAN COMMAND, OFFICE OF THE LEGAL ADVISOR, INTERIM REPORT OF LEGAL LESSONS LEARNED: WORKING GROUP REPORT, 3 (18 APRIL 1996).

[41] This obligation was written into the operation plan under the heading "Potable water." The central theme of this objective was to protect host nation water sources from contamination by "suitable placement and construction of wells and surface treatment systems, and siting and maintenance of septic systems and site treatment units." *See* Joint Endeavor Operation Plan, *supra* note 194, at para. 3.c.(1), Tab B to Appendix 5, to Annex D.

[42] Unfortunately, the suppressants did not perform well and eventually the task force had to resort to waste oil. However, the effort made to avoid the use of oil demonstrates the sensitivity of United States forces to the Somali environment. In addition, once the decision was finally made to use waste oil, the task force developed a plan to limit the use of oil and to prevent an unnecessarily harsh impact on the environment. *See* RESTORE HOPE AAR, *supra* note 184, at 24.

[43] *See* Joint Endeavor Operation Plan, *supra* note 194, at para. 3.c.14.

[44] Memorandum, Captain David G. Balmer, Foreign Claims Judge Advocate, 1st Armored Division (Task Force Eagle), to Major Richard M. Whitaker, Professor, International and Operational law, The Judge Advocate General's School, subject: Suggested Improvements for Chapter 10 of Operational Law Handbook (4 Dec. 1996) (Captain Balmer stated that the number of claims alleging environmental damage was "fairly high, and very difficult to adjudicate in the absence of photographs taken prior to the occupation of the area by U.S. forces." Captain Balmer also stated that such pictures repeatedly "saved the day when fraudulent claims were presented by local nationals").

agency for DOD with respect to Basel is the Defense Logistics Agency (DLA); and DLA hosted a conference in July 2000 on "Overseas Hazardous Waste Disposal and Readiness: What Basel Means to DOD." Should your particular operation involve potential Basel issues, you should contact the experts at DLA, particularly in their General Counsel's office.

When searching for applicable standards to apply to the seven elements expressed in Joint Publication 4-04, military lawyers can direct their search to several readily available sources. First, they can review and consider familiar environmental standards set out in Department of Defense directives and regulations. Second, they can consider the rules and standards set out in the DoD Overseas Environmental Baseline Guidance Documents (OEBGD).[45] Although baseline documents are not technically applicable to overseas contingency operations where the United States presence is less than permanent,[46] they provide a solid starting point for the formulation of environmental standards.

In each of the operations described within this article, the measures established within a country-specific baseline document were used (to varying extents) to develop the applicable environmental standards. For example, in Operation Joint Endeavor, the Germany baseline document was integrated into the operation plan as a reference[47] and as a "source of additional environmental standards, as [might be] deemed appropriate," in the interpretation or supplementation of the plan.[48]

It is important to bear in mind, however, that country specific baseline documents do not control the conduct of United States forces during a contingency operation. These guidelines are only used as a tool, providing lawyers and other staff officers a starting point when dealing with host nation environmental issues.

A third source of guidance for the construction of a system of standards is the growing collection of after action reports and operation plans and orders from recent operations. The plans from each of the foregoing operations would each serve as excellent starting points.[49] With each successive operation United States forces have become more expert in their handling of the environmental dimension of overseas operations.[50]

Command environmental standard operating procedure manuals, regulations, and instructions serve as the final source of guidance.

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[45] Department of Defense Instruction 4715.5 requires that "DoD components operating abroad develop country specific "final governing standards" (FGSs)). The OEBGD are issued to help in this task. The baseline consists of standards applicable to similar operations conducted in the United States. The baseline is compared with existing host nation law. After consultation with the United States Diplomatic Mission in the host nation, the 'Executive Agent' for that country determines whether to apply the baseline standards, the host nation standards, or some hybrid of the two. *See* Dep't of Defense, Instruction 4715.5, Management of Environmental Compliance at Overseas Installations, para. C. (22 April 1996). A new version of the OEBGD was issued on 15 March 2000 and is available on DENIX.

[46] The OEBGD "applies where EO 12,114 does not apply, . . . it establishes the environmental standards by which we run our installations overseas." *See* Briefing Slides, Lieutenant Colonel Richard D. Rosen, Deputy Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, subject: Combatant Commander's Environmental Responsibilities Overseas, slides 10-11 (Unpublished Slide Presentation, on file with author).

[47] *See* Joint Endeavor Operation Plan, *supra* note 194, at 3.c.

[48] *Id*. The general guidance placed in the plan stated "that operations shall be conducted in a manner that exhibits leadership in the area of protection of human health and the environment. Operations will be conducted with the effects on the environment considered to the extent feasible under the existing conditions. Commanders will ensure potential harm to the environment is avoided or minimized when possible. The referenced OEBGD may be used as a source for additional environmental standards, as deemed appropriate. Units will operate under their respective service environmental procedures while ensuring compliance with the following minimum standards and mitigative measures." At this point the plan continues on with additional standards and guidance.

[49] The legal work done in regard to the environment during Operation Restore Hope was excellent. The work done during Operation Uphold Democracy was even better, and the work already done and currently being done in Operation Joint Endeavor is better yet. These improvements are largely because (1) judge advocates have done a superb job of documenting their lessons learned and (2) the service judge advocate general's corps have made capturing lessons from recent operations a priority.

[50] Interview, Lieutenant Colonel John M. McAdams, Jr., Judge Advocate Division (Code JAO), Headquarters, U.S. Marine Corps, in Charlottesville, Virginia (27 Mar 1997) [hereinafter McAdams Interview] (Lieutenant Colonel McAdams served as the Joint Task Force Legal Advisor during Operation Sea Signal and stated that environmental issues consumed an appreciable amount of his time. He believes that he profited from the legal work done in Operation Restore Hope, and feels that United States Atlantic Command clearly profited from the lessons he and his staff learned during Sea Signal. He stated that he saw the product of these lessons in the execution of Operation Uphold Democracy. Specifically, he cites the decision to perform a more detailed environmental audit during Uphold Democracy, instead of the less detailed assessment performed during Sea Signal). Judge advocates should also be aware that there have been initiatives to prepare DoD environmental standards for contingency operations.

The Future and Changes in U.S. Policy and Law.. As mentioned at the beginning of this chapter, doctrine in the area of environmental considerations in military operations has evolved more quickly, and more clearly, than law and policy. During the Clinton administration, a lot of effort was expended towards developing environmental policy for military operations. This effort never bore final fruits. We will have to see what developments occur during the George W. Bush administration.

Finally, DoDI 4715.5, which requires FGSs (Final Governing Standards) be developed for each country, does not apply to operations conducted off of overseas facilities/installations. Therefore, it does not apply during the temporary operations characterized as MOOTW. However, at some point an operation that begins as a MOOTW might mature into a permanent U.S. presence. This might trigger the Directive's application. On this issue, you should contact the Unified Command in charge of the operation.

Laws of Host Nations.

U.S. forces are immune from host nation laws where:

(1) Immunity is granted by agreement;

(2) U.S. forces engage in combat with national forces;[51] or

(3) U.S. forces enter under the auspices of a UN sanctioned security enforcement mission.[52]

The question of immunity is unresolved where U.S. forces enter in a noncombat mode and not to enforce peace or end cross-border aggression. In Operation RESTORE DEMOCRACY, U.S. forces entered as part of a multinational force to protect human rights and restore democracy. There are three arguments as to why host nation environmental law should not have applied:

(1) Consent to enter by a legitimate (recognized) government included an implied grant of immunity;53

(2) Law of the Flag applied, as it did during Operation PROVIDE COMFORT;

(3) Operation was sanctioned by the UN as a Chapter VII enforcement action (even though peace enforcement in this context does not provide an exact fit).

Bottom Line. Judge advocates should contact the unified or major command to determine DoD's position relative to whether any host nation law applies. Judge advocates should request copies of relevant treaties or international agreements from the MACOM SJA or the unified command legal advisor. Finally, judge advocates should aggressively seek information relative to any plan to contact foreign governments to discuss environmental agreements or issues. The Army must consult with the Department of State before engaging in "formal" communications regarding the environment.[54]

Traditional Law of War (LOW).

[51] This exception is based upon a classical application of the Law of the Flag theory. This term is sometimes referred to as "extraterritoriality," and stands for the proposition that a foreign military force that enters a nation either through force or by consent is immune from the laws of the receiving nation. The second prong of this theory (the implied waiver of jurisdiction by consenting to the entrance of a foreign force) has fallen into disfavor. WILLIAM W. BISHOP, JR., INTERNATIONAL LAW CASES AND MATERIALS 659-661 (3d ed. 1962).

[52] This theory is a variation of the combat exception. Operations that place a UN force into a hostile environment, with a mission that places it at odds with the de facto government, triggers this exception. This is another of the very few examples where the Law of the Flag version of sovereign immunity survives.

[53] See DA PAM 27-161-1, *Law of* Peace, Volume I, para. 11-1 (1 Sep 1979).

[54] *See* AR 200-2, *supra* note 176, at para. 8-3 c.

Although the LOW is technically not triggered until a state of armed conflict exists,[55] many MOOTW require the application of LOW principles as guidance.[56] The prudent judge advocate generally advises the application of LOW in these operations because (1) to apply some other standard confuses troops that have been trained to the LOW standards and (2) because the situation can quickly evolve into an armed conflict.[57] The entire body of LOW that impacts on the treatment of the environment may be referred to as ELOW.

Customary Law. Although the environment was never considered during the evolution of customary international law or during the negotiation of all of the pre-1970s LOW treaties, the basic LOW principles discussed in Chapter 2 of this Handbook apply to limit the destruction of the environment during warfare. For example, the customary LOW balancing of military necessity, proportionality, and superfluous injury and destruction apply to provide a threshold level of protection for the environment.

Conventional Law. A number of the well-known LOW treaties have tremendous impact as ELOW treaties. These treaties are discussed below.

Hague IV.[58] Hague IV (H.IV or HR) and the regulations attached to it represent the first time that ELOW principles were codified into treaty law. The HR restated the customary principle that methods of warfare are not unlimited (serving as the baseline statement for ELOW).[59]

Article 23e forbids the use or release of force calculated to cause unnecessary suffering or destruction. Judge advocates should analyze the application of these principles to ELOW issues in the same manner they would address the possible destruction or suffering associated with any other weapon use or targeting decision.

The HR also prohibits destruction or damage of property in the absence of military necessity.[60] When performing the analysis required for the foregoing test, the judge advocate should pay particular attention to (1) the geographical extent (how widespread the damage will be) (2) the longevity, and the (3) severity of the damage upon the target area's environment.

HR ELOW protections enjoy the widest spectrum of application of any of the ELOW conventions. They apply to all property, wherever located, and by whomever owned.

The 1925 Gas Protocol.[61] The Gas Protocol bans the use of "asphyxiating, poisonous, or other gases, and all analogous liquids, materials, and devices...." during war. This treaty is an important component of ELOW because many chemicals (especially herbicides) are extremely persistent, cause devastating damage to the environment, and even demonstrate the ability to multiply their destructive force by working their way up the food chain. During the ratification of the Gas Protocol, the U.S. reserved its right to use both herbicides and riot control agents (RCA).[62]

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[55] The type of conflict contemplated by article 2, common to the four Geneva Conventions.

[56] During most of Operation Provide Comfort and during all of Operation Restore Hope, the U.S. position was that the LOW was not triggered. However, U.S. forces complied with the general tenets of the LOW. *See* DSAT, *supra* note 174, at Operational Law 15-16.

[57] With regard to Operation Provide Comfort, the question of whether we were an occupying force remains open. The DSAT reported that we were not, however in its report to Congress, DoD reported that we were occupants and were bound by the international law of occupation. This reinforces the point that Judge Advocates should err, when possible, on applying the LOW standards to situations that are analogous to armed conflict, might become armed conflict, or might be easily interpreted by others as armed conflict. DEP'T OF DEFENSE, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (April 1992).

[58] Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, including the regulations thereto [hereinafter H.IV or H.R.].

[59] *Id*. at art. 22.

[60] *Id*. at art. 23g. Most nations and scholars agree that Iraq's release of oil into the Persian Gulf during its retreat from Kuwait, during Operation Desert Storm violated this principle. Iraq failed to satisfy the traditional balancing test between military necessity, proportionality, and unnecessary suffering/destruction.

[61] The 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061 [hereinafter Gas Protocol].

[62] The U.S. position is that neither agent meets the definition of a chemical under the treaty's provisions.

The 1993 Chemical Weapons Convention (CWC).[63] The U.S. ratified the CWC on April 25, 1997. The CWC does not supersede the Gas Protocol. Instead, it "complements" the Gas Protocol. Yet, wherever the CWC creates a more rigorous rule, the CWC applies.[64] EO 11850[65] specifies U.S. policy relative to the use of chemicals, herbicides, and RCA. EO 11850 sets out several clear rules regarding the CWC.[66] As a general rule, the U.S. renounces the use of both herbicides and RCA against combatants. As a matter of policy, herbicides and RCA may not be used "in war" in the absence of presidential authorization. Finally, these restrictions do not apply relative to uses that are not methods of warfare.

In regard to herbicides, the Order sets out the two uses that are expressly permitted, even without presidential authorization. These two uses are (1) domestic use and (2) control of vegetation within and around the "immediate defensive perimeters"[67] of U.S. installations.

1980 Conventional Weapons Convention (COWC). The U.S. ratified the COWC on 24 Mar 1995 (accepting only Optional Protocols I and II of the three optional protocols). Only Optional Protocol II has ELOW significance because it places restrictions on the use of mines, booby traps, and other devices. The ELOW significance of this treaty lies in the fundamental right to a safe human environment. The COWC bans the indiscriminate use of these devices. Indiscriminate is defined as use:

(1) which is not directed against a military objective, (2) which employs a method or means of delivery that cannot be directed at a specific military objective, or (3) which may be expected to cause incidental loss of civilian life, injury to civilian objects (which includes the environment), which would be excessive in relation to the concrete and direct military advantage to be gained.[68]

The Fourth Geneva Convention GC.[69] The GC is a powerful ELOW convention, but it does not have the wide application enjoyed by the HR. The most important provision, article 53, protects only the environment of an occupied territory. Article 53 prohibits the destruction or damage of property (which includes the environment) in the absence of "absolute military necessity." Article 147 provides the enforcement mechanism for the GC. Under its provisions "extensive" damage or destruction of property, not justified by military necessity, is a grave breach of the conventions. All other violations that do not rise to this level are lesser breaches (sometimes referred to as "simple breaches").

The distinction between these two types of breaches is important. A grave breach requires parties to the conventions to search out and then either prosecute or extradite persons suspected of committing a grave breach.[70] A simple breach only requires parties to take measures necessary for the suppression of the type of conduct that caused the breach.[71]

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[63] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 [hereinafter CWC].

[64] *Id*. at Preamble.

[65] Exec. Order No. 11850, 40 Fed. Reg. 16187 (1975), *reprinted in* FM 27-10, at C1-C2 [hereinafter EO 11850].

[66] For a full discussion of EO 11850, see Chapter 2.

[67] The depth of an "immediate defensive area" will be controlled by the type of terrain, foreseeable tactics of enemy forces, and weapons routinely used in the area.

[68] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Excessively Injurious of Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1525 [hereinafter COWC].

[69] The Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC].

[70] *Id*. at art. 146, cl. 2.

[71] *Id*. at art. 146, cl. 3.

U.S. policy requires the prompt reporting and investigation of all alleged war crimes (including ELOW violations) as well as appropriate disposition under the provisions of the UCMJ.[72] These obligations make our own soldiers vulnerable if they are not well trained relative to their responsibilities under ELOW provisions.

The ENMOD Convention.[73] The U.S. negotiated the ENMOD Convention during the same period as it negotiated Protocol I Additional to the Geneva Conventions, and ratified it in 1980. Unlike all the other ELOW treaties, which ban the effect of various weapon systems upon the environment, the ENMOD Convention bans the manipulation or use of the environment itself as a weapon. Any use or manipulation of the environment that is (1) widespread, (2) long lasting, or (3) severe, violates the ENMOD (single element requirement).[74] Another distinction between the ENMOD Convention and other ELOW provisions is that it only prohibits environmental modifications which cause damage to another party to the ENMOD Convention.

The application of the ENMOD is limited, as it only bans efforts to manipulate the environment with extremely advanced technology. The simple diversion of a river, destruction of a dam, or even the release of millions of barrels of oil do not constitute "manipulation" as contemplated under the provisions of the ENMOD. Instead, the technology must alter the "natural processes, dynamics, composition or structure of the earth...." Examples of this type of manipulation are (1) alteration of atmospheric conditions to alter weather patterns, (2) earthquake modification, and (3) ocean current modification (tidal waves etc.).

The drafters incorporated the distinction between high versus low technological modification into the ENMOD to prevent the unrealistic extension of the ENMOD. For example, if the ENMOD reached low technological activities, then such actions as cutting down trees to build a defensive position or an airfield, diverting water to create a barrier, or bulldozing earth might all be considered activities that violate the ENMOD. Judge advocates should understand that none of these activities, or similar low technological activities, is controlled by the ENMOD.

Finally, the ENMOD does not regulate the use of chemicals to destroy water supplies or poison the atmosphere.[75] As before, this is the application of a relatively low technology, which the ENMOD does not reach.[76] Although the relevance of the ENMOD Convention appears to be minimal given the current state of military technology, judge advocates should become familiar with the basic tenets of the ENMOD. This degree of expertise is important because some nations argue for a more pervasive application of this treaty. Judge Advocates serving as part of a multinational force must be ready to provide advice relative to the ENMOD Convention, even if this advice amounts only to an explanation as to why the ENMOD Convention has no application, despite the position of other coalition states.[77]

The 1977 Protocols Additional to the Geneva Conventions (GP I & GP II).[78] The U.S. has not yet ratified GP I, accordingly, the U.S. is ostensibly bound by only the provisions within GP I that reflect customary international law. To some extent, GP I articles 35, 54, 55, and 56 (the environmental protection provisions within GP I) merely restate HR and GC environmental protections. To this extent, these provisions are enforceable. However, the main focus of GP I protections go far beyond the GC or the HR protections. GP I is much more specific relative to the declaration of these

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[72] Dept. of Defense, Dir. 5100.77, *DoD Law of War Program*, paras. C.3. & E.2.e.(2)-(3) (July 10, 1979); Dep't of Army, Field Manual 27-10, *The Law of Land Warfare*, para. 507 (18 July 1956).

[73] The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification techniques, May 18, 1977, 31 U.S.T. 333. 1108 U.N.T.S. 151 [hereinafter ENMOD Convention].

[74] For a discussion of the meaning of these three elements see the discussion in the next section of similar elements found in articles 35 and 55 of the 1977 Protocol I Additional to the Geneva Conventions of 1949.

[75] Although these type of activities would violate the HR and the Gas Protocol.

[76] Environmental Modification Treaty: Hearings Before the Committee on Foreign Relations, U.S. Senate, 95th Cong., 2nd Sess. 83 (1978) (Environmental Assessment) [hereinafter Senate Hearings].

[77] AUSTRALIAN DEFENCE FORCE PUBLICATION 37, THE LAWS OF ARMED CONFLICT 4-5 to 4-6 (1994) [hereinafter ADFP 37]. ADFP 37 states that the ENMOD Convention prohibits "any means or method of attack which is likely to cause widespread, long-term or severe damage to the natural environment." This arguably gross overstatement of the actual limitations placed upon a commander by the ENMOD Convention ignores the "high technology" requirement, and serves as an example of the type of misinformation that requires U.S. Judge Advocates to be conversant in treaties like the ENMOD Convention.

[78] Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391, 1125 U.N.T.S. 3 [hereinafter GP I].

environmental protections. In fact, GP I is the first LOW treaty that specifically provides protections for the environment by name.

The primary difference between GP I and the protections found with the HR or the GC is that once the degree of damage to the environment reaches a certain level, GP I does not employ the traditional balancing of military necessity against the quantum of expected destruction. Instead, it establishes this level as an absolute ceiling of permissible destruction. Any act that exceeds that ceiling, despite the importance of the military mission or objective, is a violation of ELOW.

This absolute standard is laid out in articles 35 and 55 as any "method of warfare which is intended, or may be expected, to cause widespread, long-term and severe damage to the environment." The individual meanings of the terms widespread, long-term, and severe damage have been debated at length. The ceiling is only reached when all three elements are satisfied (unlike the single element requirement of the ENMOD Convention).

Most experts and the Commentary to GP I state that long-term should be measured in decades (twenty to thirty years). Although the other two terms remain largely subject to interpretation, a number of credible interpretations have been forwarded.[79] Within GP I, the term "widespread" probably means several hundred square kilometers, as it does in the ENMOD Convention.[80] "Severe" can be explained by article 55's reference to any act that "prejudices the health or survival of the population."[81] Because the general protection found in articles 35 and 55 require the presence of all three of these elements, the threshold is set very high.[82] For instance, there is little doubt that the battlefield damage caused by conventional warfare during World Wars I and II would not have met this threshold requirement.[83]

Specific GP I protections include article 55's absolute ban on reprisals against the environment; article 54's absolute prohibition on the destruction of agricultural areas and other areas that are indispensable to the survival of the civilian population; and article 56's absolute ban on targeting works or installations containing dangerous forces (dams, dikes, nuclear plants) if such targeting would result in substantial harm to civilian persons or property.[84]

Although the foregoing protections are typically described as "absolute," the protections do not apply in a number of circumstances. For instance, agricultural areas or other food production centers used solely to supply the enemy fighting force are not protected.[85] A knowing violation of article 56 is a grave breach. Additionally, with respect to the three element threshold set out in articles 35 and 55, the standard is so high that a violation of these provisions may

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[79] Claude Pilloud, International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 410 to 420 (Yves Sandoz ed., 1987) [hereinafter Sandoz].

[80] *Id*. at 417. Sandoz cites to the Report of the Conference of the Committee on Disarmament, Vol. I, United Nations General Assembly, 31st session, supplement No. 27 (A/31/27), p. 91, wherein the intent of the drafters of the ENMOD Convention relative to each of the three elements is set out as follows:

(1) widespread: encompassing an area on the scale of several hundred kilometers;

(2) long-lasting: lasting for a period of several months, or approximately one season; and

(3) severe: involving serious or significant disruption or harm to human life, natural economic resources or other assets.

[81] *Id*. at 417. The article 55 language has roughly the same meaning as the meaning of "severe" within the ENMOD Convention.

[82] Although some experts have argued that this seemingly high threshold might not be as high as many assert. The "may be expected" language of articles 35 and 55 appears to open the door to allegation of war crimes any time the damage to the environmental is substantial and receives ample media coverage. The proponents of this complaint allege that this wording is far too vague and places unworkable and impractical requirements upon the commander. G. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 V.J.I.L. 109, 146-47 (1985).

[83] *See* Sandoz, *supra* note 249, at 417.

[84] The specific protections afforded by articles 54, 55, and 56 should be applied in conjunction article 57's "precautionary measures" requirement. For example, prior to initiating an artillery barrage, the commander must do everything "feasible" to ensure that no objects subject to special protections are within the destructive range of the exploding projectiles (dams, dikes, nuclear power plants, drinking water installations, etc.).

[85] However, if the food center is shared by both enemy military and the enemy civilian population (a likely situation), then article 54 permits no attack that "may be expected to leave the civilian population with such inadequate food or water as to cause starvation or force its movement."

also be a grave breach, because the amount of damage required would seem to satisfy the "extensive" damage test set out by GC article 147.[86]

Peacetime Environmental Law (PEL).

In cases not covered by the specific provisions of the LOW, civilians and combatants remain under the protection and authority of principles of international law derived from established principles of humanity and from the dictates of public conscience. This includes protections established by treaties and customary law that protect the environment during periods of peace (if not abrogated by a condition of armed conflict).[87] In the aftermath of Operation DESERT STORM, the international community generally accepted the application of the Martens clause as a useful contributor to the protection of the environment in times of armed conflict.[88]

CONCLUSION.

As the forgoing discussion indicates, the reality of the need to integrate environmental planning and stewardship into all phases of overseas operations cannot be ignored. A number of other initiatives are now under way to incorporate an increased awareness of the environment into both the planning and execution phases of all military operations and activities. In fact, the Army Judge Advocate General's Corps' current version of its own keystone doctrinal source for legal operations recognizes that environmental law considerations should play in the planning and execution of operations.[89]

Judge advocates, as they have traditionally done, must continue to stay aware of changes in both doctrine and law in this area. In the end, their advice must be based upon a complete understanding of the law, the client's mission, and common sense. The purpose of this article is to help judge advocates from all services provide accurate, up to date, and meaningful advice.

SUMMARIES OF SOME OF THE MAJOR DOMESTIC (U.S.) ENVIRONMENTAL LAWS

ANTARCTIC PROTECTION - 16 U.S.C. § 2461. This major legislation prohibits prospecting, exploration, and development of Antarctic mineral resources by persons under the jurisdiction of the U.S..

THE CLEAN AIR ACT - - 42 U.S.C. §§ 7401-7671q (CAA §§ 101-618), which is broken down into six subchapters, each of which outlines a particular strategy to control air pollution. Subchapter I: Control of criteria and hazardous pollutants from stationary sources; and Enforcement of the Act; Subchapter II: Mobile Source Control; Subchapter III: Administrative Provisions; Subchapter IV: Acid Rain Control; Subchapter V: Operating Permits; and, Subchapter VI: Protection of Stratospheric Ozone.

DEEPWATER PORTS- 33 U.S.C. § 1501 INTERNATIONAL APPLICATION THROUGH 33 U.S.C. § 1510. Regulates construction, ownership, and operation of deepwater ports beyond the territorial limits of the U.S., thereby protecting indigenous marine life and the coastal environment.

ENDANGERED SPECIES ACT OF 1973 - 16 U.S.C. §§ 1531-1544. The purpose of this Act is to protect threatened and endangered fish, wildlife, and plant species and the "critical habitat" of such species.

THE FEDERAL WATER POLLUTION CONTROL ACT (CLEAN WATER ACT) 33 U.S.C. 1251-1387, as amended. Controls domestic water pollution in the United States (primarily through the use of the National Pollution Discharge Elimination System (NPDES)) and also regulates wetlands.

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[86] Report of the Secretary-General on the Protection of the Environment in Times of Armed Conflict, U.N. GAOR, 6th Comm., 48th Sess., Agenda Item 144, at 17, U.N. Doc. A/48/269 (29 July 1993) [hereinafter Secretary-General's Report]. The experts that compiled the Secretary General's report felt that the GP I should be changed to make this point clear, that a violation of either article 35 or 55, at a minimum, is a grave breach.

[87] *See* HR, *supra* note 228 at Preamble. This provision, commonly referred to as the Martens Clause makes peacetime law applicable to fill in gaps in the LOW, where protection is needed to protect a certain person, place, or thing.

[88] *See* SECRETARY-GENERAL REPORT, *supra* note 256, at 15.

[89] FM 27-100*, Legal Support to Operations*, 3.6, (30 Sept. 1999).

FOREIGN ASSISTANCE - 22 U.S.C. § 2151p, ENVIRONMENTAL AND NATURAL RESOURCES. This subsection of the Foreign Assistance Legislation requires environmental accounting procedures for projects that fall under the Act and significantly affect the global commons or environment of any foreign country.

FOREIGN CLAIMS ACT - 10 U.S.C. § 2734. This major legislation prescribes the standards, procedures and amounts payable for claims arising out of noncombat activities of the U.S. Armed Forces outside the U.S..

INTERNATIONAL AGREEMENTS CLAIMS ACT - 10 U.S.C. § 2734A. Regulates payment of claims by the U.S., where such claims are based on an international agreement applying to the U.S. Armed Forces and the civilian component.

MARINE PROTECTION, RESEARCH AND SANCTUARIES ACT (72), as amended - 16 U.S.C. §§ 1401-1445 IMPLEMENTED THRU 33 U.S.C. § 1419. This major Federal legislation sets out the procedures for designation of marine sanctuaries and the enforcement procedures for their protection. It also addresses the circumstance where this legislation applies to non-citizens of the U.S..

MARINE MAMMAL PROTECTION- 16 U.S.C. § 1361 & 1378. This legislation establishes a moratorium on the taking and importation of marine mammals and marine mammal products, during which time no permit may be issued for the taking of any marine mammals nor may marine mammal products be imported into the U.S. without a permit.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) 42 U.S.C. §§4321-4370 (1969) Requires that the environmental impacts be considered before any major federal action significantly affecting the quality of the human environment is conducted.

NATIONAL HISTORIC PRESERVATION ACT - 16 U.S.C. § 470a - 2. This Act provides for the nomination, identification (through listing on the National Register) and protection of historical and cultural properties of significance. Specific procedures are established for compliance including rules for consulting the World Heritage List or equivalent national register prior to approval of any OCONUS undertaking.

OCEAN DUMPING - 33 U.S.C. § 1401 THRU 1419. Regulates the dumping of any material into ocean waters, which would adversely affect human health, welfare, amenities or the marine environment or its economic potential.

THE OIL POLLUTION ACT OF 1990 - 33 U.S.C. § 2701-2761. This is an Act to implement the provisions of the International convention for the Prevention of the Pollution of the Sea by Oil, 1954. Specifically it implements the 1969 and 1971 amendment to the International convention; but, this Act is not in effect at present time.

PRE-COLUMBIAN MONUMENTS - P.L. 92-587, TITLE II - REGULATION OF IMPORTATION OF PRE-COLUMBIAN MONUMENTAL OR ARCHITECTURAL SCULPTURE OR MURALS. This Public Law prohibits the importation into the U.S. of pre-Columbian monumental or architectural sculptures or murals which are the product of pre-Columbian Indian culture of Mexico, central America, South America, or the Caribbean Islands without a certificate from the country of origin certifying that the exportation was not in violation of law.

ACT TO PREVENT POLLUTION FROM SHIPS, 33 U.S.C. § 1901. This Act provides the enabling legislation which implements the protocol of 1978 relating to, the International Convention for the Prevention of Pollution From Ships, 1973. The protocol is specifically designed to decrease the potential for accidental oil spills and eliminate operational oil discharges from ships at sea and in coastal waters. It contains many new requirements concerning the design, construction, operation, inspection, and certification of new and existing ships. Specifically, it requires the installation of oil-water separating equipment and oil content monitors in nearly all ships and prohibits the discharge of oil at sea.

RESOURCE CONSERVATION AND RECOVERY ACT (RCRA) - 42 U.S.C. § 6938. Prohibits the export of hazardous waste without the consent of the receiving country and notification to the appropriate U.S. authorities.

<u>DEPARTMENT OF DEFENSE DIRECTIVES/INSTRUCTIONS</u>

DoDD 6050.7, Environmental Effects Abroad of Major Department of Defense Actions, March 31, 1979.

DoDI 4715.5, Management of Environmental Compliance at Overseas Installations, April 22, 1996.

DoDI 4715.8, Environmental Remediation for DoD Activities Overseas, February 2, 1998.

ARMY REGULATIONS

AR 27-20 CHAPTER 10 - CLAIMS COGNIZABLE UNDER THE FOREIGN CLAIMS ACT (FCA). (a) This chapter implements the FCA and authorizes the administrative settlement of claims of inhabitants of a foreign country, or a foreign country or a political subdivision thereof; against the United States; for personal injury, or death or property damages caused outside the U.S., its territories, commonwealths, or possessions; by military personnel or civilian employees of the DA; or claims which arise incident to noncombat activities of the Army. (b) Claims resulting from the activities, or caused by personnel of another military department, service, or agency of the U.S. may also be settled by Army foreign claims commissions when authorized by this chapter. (c) Claims arising from acts or omissions of employees of nonappropriated fund activities may also be settled by Army foreign claims commissions pursuant to this chapter, otherwise applicable, but are payable from nonappropriated funds (chap. 12).

AR 200-1 ENVIRONMENTAL PROTECTION AND ENHANCEMENT (February 1997. Regulates compliance with environmental standards set out in HN law or Status of Forces Agreements (SOFA) and supplies regulatory standards for OCONUS commanders at locations where there is an absence of HN law or SOFA requirements.

AR 200-2 (Subpart H & G) - EFFECTS OF ARMY ACTIONS ABROAD. Appendix 6, requires that proposed actions affecting "global commons" be subject to a documented decision making process. "Global commons" are areas outside the jurisdiction of any nation, including such areas as the oceans and Antarctica. AR 200-2, Glossary.

Appendix H requires that proposed actions significantly harming the environment of a foreign nation or a protected "global resource" also be subject to a documented decision making process.

AR 200-3 NATURAL RESOURCE MANAGEMENT. Deals with natural resources and the Army's endangered species program.

AR 200-4 HISTORIC PRESERVATION. This regulation prescribes management responsibilities and standards for the treatment of historic properties, including buildings, structures, objects, districts, sites, archaeological materials, and landmarks, on land controlled or used by the Army. Outside the U.S., Department of Army activities will comply with: (1) historic preservation requirement of the HN; (2) International and Status of Forces Agreements; (3) requirements for protections of properties on the World Heritage List, and this regulation to the extent feasible..

ARMY PAMPHLETS:

Department of Army Pamphlet 200-1, Environmental protection and Enhancement (17 January 2002). This pamphlet explains how the Army will execute the "U.S. Army Environmental Strategy into the 21st Century." It portrays environmental stewardship in all actions as part of the Army mission. This pamphlet describes, in detail, Department of the Army (DA) procedures and methodology to be followed in preserving, protecting, and restoring environmental quality in accordance with Army Regulation (AR) 200-1. Chapter 14 covers the Army Environmental Program in foreign countries. Table 15-3 is a table of National Security exemptions contained in the federal environmental statutes.

NAVY REGULATIONS[90]

NAVY OPNAVINST 5090.1B - NAVY PROGRAM FOR THE PROTECTION OF THE ENVIRONMENT AND CONSERVATION OF NATURAL RESOURCES. This recently updated instruction contains guidance to deployed commanders concerning the management of hazardous materials, the disposal of hazardous waste, and ocean dumping. It also contains the Navy's implementing guidance for Executive order 12,114 and DoD Directive 6050.7, and sets out the factors that require environmental review for OCONUS actions.

[90] *See* Chapter 36 (Environmental Protection Overseas), NAVJUSTSCOL Envir. Law Deskbook (Rev.5/94); Sec. 1006 (Foreign Environmental Law), JAGINST 5800.7C, JAGMAN, 3 Oct. 90; Art. 0939, U.S. Navy Reg, 1990.

MARINE CORPS ORDERS[91]

MARINE MCO P5090.2A - ENVIRONMENTAL COMPLIANCE AND PROTECTION MANUAL. This codification of Marine Corps environmental policies and rules instructs the deployed commander to adhere to SOFA guidance and HN laws that establish and implement HN pollution standards.

AIR FORCE INSTRUCTIONS

AFI 32-7006 ENVIRONMENTAL PROGRAM IN FOREIGN COUNTRIES (29 April 1994).

AFI 32-7061 THE ENVIRONMENTAL IMPACT ANALYSIS PROCESS (24 January 1995).(EIAP) OVERSEAS. This regulation is the Air Force's implementing guidance for Executive Order 12,114 and DoD Directive 6050.7. It sets out service activities that require environmental documentation and the type of documentation required.

[91] *See* MCO P5090.2, Envir. Compliance and Protection Manual, 26 Sep 91.